

Limitations Period

Charter proposed language for a two-year limitations period for billing disputes with a limitations period that begins upon the occurrence that gives rise to the dispute. In contrast, CenturyTel proposes a requirement that the billed party be required to provide written notice of the dispute and, if informal resolution is not successful within 180 days, file a petition for formal dispute resolution within one year of the written notice.

The Federal Communications Act provides for a general statutory limitations period of two years for disputes between carriers. 47 U.S.C. § 415 (2008). Similarly the ICAs approved in Docket No. 28821⁴⁹ contain simple two-year limitations periods. The Arbitrators therefore adopt Charter's proposal for a basic two-year statutory limitation period.

Tariffs

In its Exceptions to the Proposal for Award, Charter disagreed with the Arbitrators' decision to accept language from the Docket No. 28821 Mega Arbitration, as appropriate for defining the term "tariff" and "incorporating by reference" the terms and conditions of certain tariffs into an interconnection agreement. Charter posits that the Arbitrators' decision ignores record evidence, adopts "overly broad language" that would result in very real consequences and would likely lead to more disputes.⁵⁰ Charter cited to proceedings in other states and at the FCC as a valid demonstration that Century Telephone would abuse "overly-broad" language to its favor.⁵¹

The Arbitrators are not aware of any post-interconnection dispute regarding tariffs and their incorporation by reference that has been brought before this Commission that has necessitated a review of the language adopted in the Docket No. 28821. As such, the Arbitrators do not find the record evidence brought forth by Charter to be persuasive to support a change to the existing language approved in previous arbitrations by this Commission. The Arbitrators

⁴⁹ *Id.* Section 11.1.1, p. 22.

⁵⁰ Charter Fiberlink TX-CCO, LLC Exceptions to the Proposal for Award at 18-19.

⁵¹ *Id.*

find Charter's argument unconvincing that its proposed language is "better" than the language approved by the Commission in previous arbitrations.

Local Service Request (LSR) Service Order Charge

Charter contends that under the FCC's rules, CenturyTel cannot assess any charges, including service order charges, on Charter to process a LNP request. Charter cites 47 C.F.R. § 52.23, which states that carriers may recover their carrier-specific costs directly related to providing long-term number portability by establishing in tariffs filed with the FCC, certain charges over a five-year period.

CenturyTel asserts that the service order charges are not a carrier-specific cost that is directly related to providing long-term number portability but is rather an administrative cost that should be assessed to the "cost-causer." CenturyTel cites the FCC's LNP Clarification Order. In that Order, the FCC states that standard fees assessed by BellSouth are administrative fees not subject to the number portability recovery mechanism. CenturyTel also cites Docket No. 31577 in which this Commission approved LSR charges for number portability service orders.

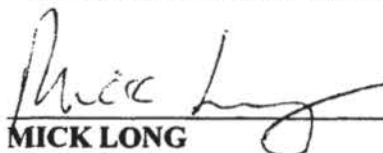
The Arbitrators agree with CenturyTel's argument presented in its exceptions that the service order charges are not a carrier-specific cost that is directly related to providing long-term number portability but is rather an administrative cost that should be assessed to the "cost-causer." Furthermore, the Arbitrators agree with the Commission's previous decision in Docket No. 31577, that each party is entitled to impose a "just and reasonable" charge to the other party for porting a customer to that party so long as that charge is based on the actual, forward-looking cost of performing the function and is nondiscriminatory. The Commission also upheld the Arbitrators decision in that docket that states the "cost-causer" should bear the costs of LSRs.⁵²

⁵² *Petition of Sprint Communications Company, L.P. for Compulsory Arbitration Under the FTA to Establish Terms and Conditions for Interconnection Terms with Consolidated Communications of Fort Bend Company and Consolidated Communications Company of Texas*, Docket No. 31577, Arbitration Award, (December 19, 2006).

V. CONCLUSION

The Arbitrators conclude that the decisions outlined in the Award and the Award matrix, as well as the conditions imposed on the parties by these decisions, meet the requirements of FTA §§ 251 and 252 and any applicable regulations prescribed by the FCC pursuant to FTA §§ 251 and 252.

SIGNED AT AUSTIN, TEXAS the 22nd day of July 2009.

PUBLIC UTILITY COMMISSION OF TEXAS

MICK LONG
ARBITRATOR



LIZ KAYSER
ARBITRATOR

Staff Arbitration Team Member:
John Costello

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<u>Issue No.</u>	<u>Charter Fiberlink (Charter) and CenturyTel of Lake Dallas (CenturyTel) Statement of Issues</u>	<u>Attachment & Sections</u>	<u>Commission Decision</u>
1.	RESOLVED		RESOLVED
2.	Both Parties' Issue Statement: How should the Agreement define the term Network Interface Device or "NID"?	Art. II, § 2.103	<p>The Arbitrators find that in the FCC's Triennial Review Order (TRO), ¶ 343, the FCC stated "[f]urthermore, because the incumbent LEC's network demarcation point may be located at the NID, before the NID or beyond the NID, which is always located at the customer's premises, it is appropriate to discuss the NID together with the "inside wire" subloop. The FCC recognized that these terms are related.</p> <p>The Arbitrators agree with CenturyTel's argument that the terms NID, Inside Wire, and Point of Demarcation are all related. The Arbitrators find that the contract language proposed by CenturyTel provides a description of the relationship between these terms, which in turn should lessen the disputes between the parties.</p> <p>The Arbitrators adopt the contract language proposed by CenturyTel:</p> <p>2.103 Network Interface Device (NID)</p> <p>A means of interconnecting Inside Wiring to CenturyTel's distribution plant, such as a cross-connect device used for that purpose. The NID houses the protector, the point from which the Point of Demarcation is determined between the loop (inclusive of the NID) and the End User Customer's Inside Wire pursuant to 47 CFR 68.105.</p>
3.	Both Parties' Issue Statement: There are two separate issues presented in Issue 3: (a) How should the Agreement define the term "Tariff"? (b) How should specific Tariffs be incorporated into the Agreement?	Art. II, § 2.140 and Art. I, § 3	<p>The parties presented no new arguments as to the reasonableness of changing the existing Commission decision applicable to tariffs and their incorporation into an interconnection agreement (ICA) as decided by the Commission in Docket No. 28821. The parties merely provided rhetorical references to potential abuses and inconsistent treatment if specific details regarding rates, terms, and conditions of a "tariff" or "tariff reference" are not identified within the body of the ICA.</p> <p>The Arbitrators conclude that the following contract language from the Arbitration Award of Docket No. 28821 should be incorporated into the Agreement. <i>See Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement</i>, Docket No. 28821, Track I Arbitration Award at 8-10 (February 23, 2005):</p>

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			<p>2.3.1 To the extent a tariff provision or rate is incorporated or otherwise applies between the Parties due to the provisions of this Agreement, it is understood that said tariff provision or rate applies only in the jurisdiction in which such tariff provision or rate is filed, and applies to the CLEC and only to where CenturyTel of Lake Dallas operates within that jurisdiction. Further, it is understood that any changes to said tariff provision or rate are also automatically incorporated herein or otherwise hereunder, effective hereunder on the date any such change is effective.</p> <p>2.3.2 Wherever any Commission ordered tariff provision or rate is incorporated, cited or quoted herein, it is understood that said incorporation or reference applies only to the entity within the state whose Commission ordered that tariff.</p> <p>2.3.3 CenturyTel will provide CLEC notice of any tariff or filing which concerns the subject matter of this Agreement at the time an Informational or Administrative Notice is transmitted to the Public Utility Commission of Texas which is filed within ninety (90) days (forty-five (45) days for price changes) of the expected effective date of the tariff or filing.</p> <p>2.3.4 In the event that CenturyTel is required by any governmental authority to file a tariff or make another similar filing in connection with the performance of any action that would otherwise be governed by the Agreement, CenturyTel will provide CLEC notice of the same as set forth in Section 2.3.3 above.</p> <p>2.3.5 If any tariff referred to in Section 2.3.4 becomes ineffective by operation of law, through deregulation or otherwise, the terms and conditions of such tariffs, as of the date on which the tariffs became ineffective, will be deemed incorporated if not inconsistent with this Agreement.</p>
4.	Termination of Agreement (Sub-Issues 4(a) and 4(b))		
4(a)	<p>Charter Issue Statement: Should the Agreement include terms that allow one Party to terminate the Agreement without any oversight, review, or approval of such action, by the Commission?</p> <p>CenturyTel Issue Statement: Should a Party be allowed to suspend performance under or terminate the Agreement when the other Party is in default, and the defaulting Party refuses to cure such default within thirty (30) days after receiving notice of such default? How</p>	Art. III, §2.6	<p>The Arbitrators adopt the language proposed by CenturyTel modified as indicated below. The Arbitrators find that this language is consistent with the termination provisions contained in the ICAs approved in Docket No.28821 and in particular consistent with the approved ICA from that Docket adopted by Charter for interconnection with SBC in Texas. <i>See. Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement</i>, Docket No. 28821 INTERCONNECTION AGREEMENT-TEXAS between Southwestern Bell Telephone, L.P. d/b/a SBC TEXAS and CLEC, Section 2.0, p. 7 (ICA between SBC TEXAS and CLEC Coalition). (August 25, 2005.) In contrast the Arbitrators are unaware of, and Charter has not cited, any ICA approved in Texas that would require a Commission proceeding prior to termination as advocated by Charter.</p>

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	should "default" be defined in the Agreement?		<p>The Arbitrators note that there is ample provision for a party to contest a termination before it occurs under current Commission rules and procedures and believes it is unnecessary to require prior Commission approval in all instances.</p> <p>The Commission modifies the language proposed by CenturyTel to extend the default cure period to 45 days as provided in the ICAs approved in Docket 28821. The Commission adopts CenturyTel's proposed contract language as modified below:</p> <p>Art.III, §2.6 Suspension or Termination Upon Default.</p> <p>Either Party may suspend or terminate this Agreement, in whole or in part, in the event of a Default (defined below) by the other Party; provided, however, that the non-defaulting Party notifies the defaulting Party in writing of the Default and the defaulting Party does not cure the Default within thirty (30) <u>forty-five (45)</u> calendar days of receipt of written notice thereof. Following CenturyTel's notice to **CLEC of its Default, CenturyTel shall not be required to process new service orders until the Default is timely cured.</p> <p>"Default" is defined to include:</p> <ul style="list-style-type: none"> (a) A Party's insolvency or the initiation of bankruptcy or receivership proceedings by or against the Party; or (b) The revocation by the Commission of a Party's Certificate of Operating Authority or Service Provider Certificate of Operation Authority . or (c) A Party's violation of any material term or condition of the Agreement; or (d) A Party's refusal or failure in any material respect properly to perform its obligations under this Agreement, including but not limited to its refusal or failure to pay undisputed charges (pursuant to Section 9) within thirty (30) <u>forty-five (45)</u> calendar days after the bill date.
4(b)	Both Parties' Issue Statement: What terms should govern the right of a Party to terminate this Agreement upon the sale of a specific operating area?	Art. III, §2.7	<p>The Arbitrators find that Charter's proposal to require a third party purchasing a service area from CenturyTel to assume the ICA is an unwarranted restriction on CenturyTel's ability to contract for the sale of its service areas and that there are adequate existing provisions in law to ensure the transition to, and renegotiation of, an appropriate ICA in the event of such a sale.</p> <p>The Arbitrators also note that the ICAs approved in Docket Nos. 35402 and 32453 allow for the termination of the ICA upon the sale of service areas without the purchaser assuming the existing ICA. See <i>Petition of Comcast Phone of Texas, LLC for Arbitration of an Interconnection Agreement with United Telephone Company of Texas, Inc. D/B/A/ Embarq and Central Telephone Company of Texas, Inc D/B/A Embarq Pursuant to Section 252 of the Federal Communications Act of 1934, as Amended and</i></p>

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			<p><i>Applicable State Laws</i>, Docket No. 35402, INTERCONNECTION AND COLLOCATION AGREEMENT FOR THE STATE OF TEXAS Comcast Phone of Texas, LLC, and United Telephone Company of Texas, Inc. d/b/a Embarq Central Telephone Company of Texas, Inc. d/b/a Embarq, Section 5, p.21 (October 21, 2008); <i>Petition of United Telephone Company of Texas, Inc. D/B/A Sprint for Arbitration with Cedar Valley Communications, Inc. pursuant to Section 252(B)(1) of the Federal Telecommunications Act of 1996</i>, Docket No. 32453, INTERCONNECTION, COLLOCATION AND RESALE AGREEMENT FOR THE STATE OF TEXAS Cedar Valley Communications, Inc. and United Telephone Company of Texas, d/b/a Embarq, Section 5, p. 22 (ICA between SBC Texas and CLEC Coalition)(July 17, 2006).</p> <p>The Commission adopts CenturyTel's proposed contract language:</p> <p>2.7 Termination Upon Sale.</p> <p>Notwithstanding anything to the contrary contained herein, a Party may terminate this Agreement as to a specific operating area or portion thereof if such Party sells or otherwise transfers the area or portion thereof to a non-affiliate. The selling or transferring Party shall provide the other Party with at least ninety (90) calendar days' prior written notice of such termination, which shall be effective on the date specified in the notice. Notwithstanding termination of this Agreement as to a specific operating area, this Agreement shall remain in full force and effect in the remaining operating areas. The Parties agree to abide by any applicable Commission Order regarding such sale or transfer.</p>
5.	<p>Charter Issue Statement: Should the Agreement allow either Party to assign the Agreement to a third-party in connection with a sale, without having to first obtain the other Party's consent?</p> <p>CenturyTel Issue Statement: Should a Party's right to assign its rights and obligations under the Agreement, <i>without consent</i>, to a subsidiary or Affiliate be restricted to only those assignments made in conjunction with the sale of all or substantially all of the Party's assets?</p>	Art. III, §5	<p>The Arbitrators find that Charter has failed to make a persuasive case for limiting the Parties' ability to assign (without consent) the ICA to its subsidiaries or affiliates to instances when that party is selling all or substantially all of its assets. Freedom to assign contracts is generally favored under the law and the Arbitrators note that the ICAs approved in Docket No. 28821 do not require prior consent for the assignment of the ICA in any instance. See <i>Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement</i>, Docket No. 28821 INTERCONNECTION AGREEMENT-TEXAS between Southwestern Bell Telephone, L.P. d/b/a SBC TEXAS and CLEC, Section 5.0, p. 11 (ICA between SBC TEXAS and CLEC Coalition) (August 25, 2005). The Arbitrators conclude that it is reasonable to allow the assignment of the ICA by a party to its subsidiary or affiliate without prior consent and the Arbitrators note that under CenturyTel's proposed language the effectiveness of the assignment is conditioned on the other Party's being reasonably satisfied that the assignee is "able to fulfill the assignor's obligations".</p>

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			<p>The Arbitrators adopt CenturyTel's proposed language:</p> <p>5. ASSIGNMENT</p> <p>Any assignment, in whole or in part, by either Party of any right, obligation, duty or interest arising under the Agreement without the written consent of the other Party, which consent shall not be unreasonably withheld, conditioned or delayed, shall be null and void, except that either Party may assign, to the extent consistent with Applicable Law, all of its rights, and delegate its obligations, liabilities and duties under this Agreement, either in whole or in part, to any entity that is, or that was immediately preceding such assignment, a subsidiary or Affiliate of that Party without consent, upon ninety (90) calendar days' written notification. The effectiveness of an assignment shall be conditioned upon the assignee's written assumption of the rights, obligations, and duties of the assigning Party, and the other Party being reasonably satisfied that the assignee is able to fulfill the assignor's obligations hereunder. Any attempt to make an assignment or delegation in violation of this section shall constitute a default of this Agreement.</p>
6.	RESOLVED		RESOLVED
7.	RESOLVED		RESOLVED
8.	<p>There are two separate issues presented in Issue 8:</p> <p>(a) Charter Issue Statement: Should the bill payment terms related to interest on overpaid amounts be equitable?</p> <p>(a) CenturyTel Issue Statement: Should the <i>billed Party</i> be entitled to receive interest from the billing Party on amounts paid to the billing Party in error and which are later returned to the billed Party?</p> <p>(b) Charter Issue Statement: Should the bill dispute provisions ensure that neither Party can improperly terminate the Agreement in a manner that could impair service to the public?</p>	9.4, 9.5	<p>DPL Issue 8(a):</p> <p>The Arbitrators find that 9.4.1 in Article III: General Terms and Conditions, addresses <i>Disputed Amounts Withheld From Payment</i>. The undisputed language that has been proposed by the Parties in this section, states that "...the billed Party may withhold payment of such Disputed Amounts only if it gives written notice to the billing Party of the amounts it disputes...." This section goes on to say that "[d]isputed billing claims shall be submitted no later than the Bill Due Date." 9.4.1 allows Charter to withhold payment of disputed amounts so long as written notice of those disputes are filed no later than the bill due date.</p> <p>The Arbitrators find the arguments to support Charter's proposed contract language in 9.4.2, unconvincing. In 9.4.1, Charter is given the option of withholding any disputed amount from its bills so long as it submits a written notice to the billing Party of such disputed amount prior to the bill due date. If Charter chooses not to take advantage of this provision to withhold disputed amounts, then it should not be allowed to receive interest on the disputed amounts at a later date.</p> <p>Therefore, the Arbitrators adopt the contract language proposed by CenturyTel for 9.4.2.</p>

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<p>(b) CenturyTel Issue Statement: Should the billing Party be permitted to suspend or discontinue accepting orders from the billed Party under certain conditions when the billed Party fails or refuses to pay "undisputed" charges?</p>	<p>9.4.2 <u>Billing Disputes Related to Paid Amounts</u> If any portion of an amount paid to a Party under this Agreement is subject to a bona fide dispute between the Parties ("Disputed Paid Amount"), the billed Party may provide written notice to the billing Party of the Disputed Paid Amount, and seek a refund of such amount already paid, at any time prior to the date that is one (1) year after the date of the invoice containing the disputed amount that has been paid by the billed Party ("Notice Period"). If the billed Party fails to provide written notice of a Disputed Paid Amount within the Notice Period, the billed party waives its rights to dispute its obligation to pay such amount, and to seek refund of such amount.</p> <p>DPL Issue 8(b):</p> <p>The Commission decided in Docket No. 28821, Track I, the appropriate provisions that should govern the suspension/termination of service for non-payment. The arguments presented by each of the Parties in the instant docket do not persuade the Arbitrators to deviate from the Commission's previous decision in Docket No. 28821, Track I. <i>See Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement</i>, Docket No. 28821, Track I Arbitration Award at 30-35, (February 23, 2005). Because of the magnitude of modifications that would be required of either Party's proposed contract language in order to reflect the previous Commission decision regarding suspension/termination of service for non-payment, the Arbitrators have developed the following contract language for 9.5, <i>Effect of Non-Payment</i>.</p> <p>The Arbitrators have also determined that a more reasonable timeframe for payment of the first and second notices of non-payment is fifteen (15) calendar days for each notice. Furthermore, to provide a higher level of protection for the Resale End User, in addition to CenturyTel sending a thirty (30) days notice to Resale End Users informing them of the need to designate a new provider, CenturyTel shall send the Commission a list of all Resale End Users that are being notified.</p> <p>The Arbitrators also find that in order to avoid having a Non-Paying Party shift customers from one platform to another (i.e. changing customers from UNE to resale) to avoid paying certain charges, CenturyTel shall disconnect the Billed Account Number (BAN) and not just the individual service that is past-due.</p> <p>The Arbitrators adopt the following language regarding the suspension of processing orders and disconnection for non-payment of undisputed charges:</p> <p>9.5 Effect of Non-Payment</p>
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		<p>9.5.1 If the billed Party does not remit payment of all undisputed charges <u>including but not limited to any Late Payment Charges or miscellaneous charges ("Unpaid Charges")</u> on a bill by the Bill Due Date, <u>CenturyTel will notify the Non-paying Party in writing that in order to avoid disruption or disconnection of the relevant or related services provided under this Agreement, the Non-paying Party must remit all Unpaid Charges to CenturyTel within fifteen (15) Calendar Days following receipt of CenturyTel's notice of Unpaid Charges.</u></p> <p>9.5.2 If the Non-Paying Party desires to dispute any additional portion of the Unpaid Charges, the Non-Paying Party must complete all of the following actions not later than <u>ten (10) business days following receipt of CenturyTel's notice of Unpaid Charges:</u></p> <p>9.5.3.1 <u>Notify CenturyTel in writing which portion(s) of the Unpaid Charges it disputes, including the total amount disputed ("Disputed Amounts") and the specific details listed in 9.4.1 of this Agreement, together with the reasons for its dispute; and</u></p> <p>9.5.3.2 <u>pay all undisputed Unpaid Charges to CenturyTel.</u></p> <p>9.5.4 <u>Issues related to Disputed Amounts shall be resolved in accordance with the procedures identified in the Dispute Resolution provision set forth in Section 20 of this Agreement.</u></p> <p>9.5.5 <u>After expiration of the written notice furnished pursuant to Section 9.4.1 hereof, if Non-paying Party continues to fail to comply with Section 9.5.1 through 9.5.3.2, inclusive, or make payment(s) in accordance with the terms of any mutually agreed payment arrangement, CenturyTel shall, in addition to exercising any other rights or remedies it may have under Applicable Law, furnish a second written demand to Non-paying Party for payment within fifteen (15) calendar days of any of the obligations enumerated in Section 9.5.2. On the day that CenturyTel provides such written demand to the Non-paying Party, CenturyTel may also exercise any or all of the following options:</u></p> <p>9.5.5.1 <u>Suspend acceptance of any application, request or order from the Non-Paying party for new or additional Interconnection, Resale Services, network elements, Collocation, functions, facilities, products or services under this agreement; and/or</u></p> <p>9.5.5.2 <u>Suspend completion of any pending application, request or order from the Non-Paying Party for new or additional Interconnection, Resale Services, Network Elements, Collocation, functions, facilities, products or services under this Agreement.</u></p> <p>9.5.6 If the Non-Paying Party fails to pay CenturyTel on or before the date specified in</p>
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			<p><u>the demand letter provided under Section 10.4 of this Agreement, CenturyTel may, provided that the undisputed amount of Unpaid Charges exceeds five percent (5%) of the aggregate amount billed by CenturyTel to the Non-Paying Party for the immediately preceding month under this Agreement, in addition to exercising any other rights or remedies it may have under Applicable Law:</u></p> <p><u>9.5.6.1 Cancel any pending application, request or order for new or additional Interconnection, Resale Services, Network Elements, Collocation, functions, facilities, products or services under this Agreement; and</u></p> <p><u>9.5.6.2 Disconnect any Resale Services, Network Elements and/or Collocation furnished under this Agreement. Disconnection of services shall occur for all services provided from CenturyTel for the Non-Paying Party's Billed Account Number (BAN).</u></p> <p><u>9.5.7 Within five (5) calendar days following any such disconnection, CenturyTel will notify each Resale End User that because of Non-Paying Party's failure to pay CenturyTel, the End User's local service will continue for an additional thirty (30) calendar days and that the End User has thirty (30) calendar days from the disconnection date to select a new Local Service Provider. CenturyTel will notify the Commission of the names of all Resale End Users who received a notice under Section 9.5.7.</u></p> <p><u>9.5.8. If any Resale End User fails to select a new Local Service Provider within thirty (30) calendar days of the disconnection, CenturyTel may terminate the Resale End User's service.</u></p> <p><u>9.5.9. CenturyTel will notify the Commission of the names of all Resale End Users whose local service was terminated pursuant to Section 9.5.8.</u></p> <p><u>9.5.10. Non-Paying Party shall be responsible for all charges for any service furnished by CenturyTel to any End User pursuant to Section 9.5.7.</u></p> <p><u>9.5.11. Nothing in this Agreement shall be interpreted to obligate CenturyTel to continue to provide local service to any Resale End User beyond the thirty (30) calendar day selection period. Nothing herein shall be interpreted to limit any and all disconnection rights CenturyTel has with regard to such Resale End Users under Applicable Law.</u></p>
9.	RESOLVED		RESOLVED
10.	Both Parties' Issue Statement: When should certain changes in law be given retroactive effect?	12.3	The parties have agreed that in the event there is a change in law which affects the ICA they will renegotiate the affected provisions and in the absence of agreement arbitrate the disputed issues before the Commission. In addition, CenturyTel proposes

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		<p>establishing a retroactive date for application of the change of law if one is not specified in the law. Charter would not provide a retroactive effective date in the ICA. The Arbitrators do not believe that a compelling case has been made for the inclusion of a retroactive effective date in the ICA. None of the ICAs approved in Docket Nos. 28821, 35402 or 32453 contain a retroactive effective day for change of law amendments. <i>Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement</i>, Docket No. 28821 INTERCONNECTION AGREEMENT-TEXAS between Southwestern Bell Telephone, L.P. d/b/a SBC TEXAS and CLEC, Section 3, p.8 (ICA between SBC TEXAS and CLEC Coalition) (August 25, 2005); <i>Petition of Comcast Phone of Texas, LLC for Arbitration of an Interconnection Agreement with United Telephone Company of Texas, Inc. D/B/A/ Embarq and Central Telephone Company of Texas, Inc D/B/A Embarq Pursuant to Section 252 of the Federal Communications Act of 1934, as Amended and Applicable State Laws</i>, Docket 35402, INTERCONNECTION AND COLLOCATION AGREEMENT FOR THE STATE OF TEXAS Comcast Phone of Texas, LLC, and United Telephone Company of Texas, Inc. d/b/a Embarq Central Telephone Company of Texas, Inc. d/b/a Embarq, Section 4.2, p.19 (October 21, 2008); <i>Petition of United Telephone Company of Texas, Inc. D/B/A Sprint for Arbitration with Cedar Valley Communications, Inc. pursuant to Section 252(B)(1) of the Federal Telecommunications Act of 1996</i>, Docket No. 32453, INTERCONNECTION, COLLOCATION AND RESALE AGREEMENT FOR THE STATE OF TEXAS Cedar Valley Communications, Inc. and United Telephone Company of Texas, d/b/a Embarq, Section 4.2, p. 20 (July 17, 2006).</p> <p>The Arbitrators believe this issue should be left for negotiation by the parties and if need be direction by the Commission. Similarly, the Arbitrators do not believe that a provision addressing true-up needs to be included in the ICA, but instead is best addressed in any necessary renegotiation by the Parties.</p> <p>The Arbitrators therefore adopt, with modification, Charter's proposed contract language as follows:</p> <p>12.3 Retroactive Application of Change in Law.</p> <p>If the Parties amend the terms and conditions of this Agreement to add, remove, or modify terms of the Agreement following a change in Applicable Law, pursuant to this Section 12, such amended terms and conditions shall apply retroactively to the effective date for the change specified by Applicable Law, if so ordered by the FCC, court of competent jurisdiction, or the Commission ("Relevant Authority") if not specified by Applicable Law, <u>or as agreed to by the Parties</u>. Further, to the extent a true-up of any billing or payment for existing services and/or facilities is required by the change in Applicable Law, the Parties shall include in the change in law amendment appropriate</p>
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			true up terms and conditions, if so ordered by the Relevant Authority.
11.	<p>Charter Issue Statement: Should CenturyTel be allowed to incorporate its Service Guide as a means of imposing certain process requirements upon Charter, even though Charter has no role in developing the process and procedural terms in the Service Guide?</p> <p>CenturyTel Issue Statement: Should certain business and operational processes and procedures set forth in CenturyTel's "Service Guide" be incorporated by reference into the Agreement?</p>	41	<p>The Arbitrators find that Charter's arguments are not persuasive. In Docket No. 28821, the Commission found that it is in the best interest of both CLECs and the ILEC that there is a uniform method of ordering, provisioning, reporting trouble cases, maintenance, etc. for wholesale services. <i>See Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement</i>, Docket No. 28821, <i>Interconnection Agreement between SBC and CLEC Joint Petitioners, Attachment 27: OSS, Section 3.8</i>, (8/11/2005). The Commission determined that these processes, forms, and lists should be available for access by all CLECs and that the most accessible location for this information would be in a CLEC Guide/Handbook on the ILEC's website.</p> <p>The Arbitrators agree with CenturyTel that having uniform procedures for ordering, provisioning, maintenance, trouble reporting, and repair for wholesale services available on its web site in the Service Guide would be most beneficial to all CLECs. Having this information available in the Service Guide would also ensure that all CLECs receive parity treatment for these processes. In addition, requiring CenturyTel to negotiate a different method with each CLEC is unreasonable. Furthermore, the Arbitrators find that it is appropriate to incorporate in the Parties' ICA references to certain business and operational processes and procedures set forth in the "Service Guide".</p> <p>The Arbitrators adopt the contract language proposed by CenturyTel:</p> <p>41. STANDARD PRACTICES</p> <p>41.1 The Parties acknowledge that CenturyTel shall be adopting some industry standard practices and/or establishing its own standard practices to various requirements hereunder applicable to the CLEC industry which may be added in the CenturyTel Service Guide, which is further described in Section 53. Charter agrees that CenturyTel may implement such practices to satisfy any CenturyTel obligations under this Agreement. Where a dispute arises between the Parties with respect to a conflict between the CenturyTel Service Guide and this Agreement, the terms of this Agreement shall prevail.</p>
11. (cont'd)	<p>(Cont'd)</p> <p>See Parties' issue statements immediately above.</p>	53	<p>The Arbitrators find that Charter's argument that CenturyTel's proposed language would effectively permit it to unilaterally modify the contractual obligations of either party and would defeat the purpose of entering into the Agreement is unfounded. The Arbitrators find that CenturyTel's proposed Section 53 effectively addresses any</p>

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		<p>concerns regarding conflict between the Parties' Agreement and the Guide.</p> <p>The Arbitrators adopt CenturyTel's proposed language with the following modifications:</p> <p>53. CENTURYTEL SERVICE GUIDE</p> <p>53.1 The CenturyTel Service Guide ("Guide") is a handbook that contains CenturyTel's operating procedures for service ordering, provisioning, billing, maintenance, trouble reporting and repair for wholesale services. In addition to setting forth operational procedures to facilitate the implementation of this Agreement, the Guide serves as a conduit for the conveyance of day-to-day information that **CLEC will need to operate under this Agreement (e.g., repository for CenturyTel's contact and escalation lists available to **CLEC). **CLEC agrees that, where the terms of this Agreement specifically reference the Guide, **CLEC will abide by the Guide with respect to such specifically-referenced matters. **CLEC may <u>shall</u> receive email notification of any changes made to the Guide so long as **CLEC subscribes to such electronic notification procedure, which subscription is at no cost to **CLEC. <u>If CLEC does not subscribe to electronic notification, then notification of such changes shall be mailed to CLEC. All notifications, whether sent to CLEC electronically or mailed to the CLEC, shall include detailed explanation of all changes made to the Guide. CenturyTel shall notify CLEC of all changes not less than 30 days prior to the effective date of the change.</u></p> <p>53.2 The Guide is intended to supplement the terms of this Agreement where specifically referenced in the Agreement; however, the Guide shall not be construed as contradicting or modifying the terms of this Agreement, nor shall it be construed as imposing a substantive term unrelated to operational procedure (e.g., payment terms) upon **CLEC that is not otherwise contained in this Agreement. Where a dispute arises between the Parties with respect to a conflict between the Guide and this Agreement, the terms of this Agreement shall prevail. If Charter believes that a change to the Guide materially and adversely impacts its business, the implementation of such change, upon Charter's written request, will be delayed as it relates to Charter for no longer than sixty (60) days to provide the Parties with an opportunity to discuss a resolution to the alleged adverse impact, including but not limited to other potential modifications to the Guide. If the Parties are unable to resolve the dispute regarding the change to the Guide, the Parties will resolve the dispute pursuant to the Dispute Resolution procedures set forth in Section 20.3.</p> <p>53.3 The Parties acknowledge that, under their prior interconnection agreement, they have or have had disputes pertaining to the applicability and effect of certain provisions in the Guide ("prior Guide disputes"). Section 53.2 is intended to prevent such disputes on a</p>
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			going-forward basis under this Agreement. Nevertheless, neither this Section 53 nor any of the concessions reflected therein shall be considered an admission by either Party with respect to any prior Guide dispute, and neither Party will attempt to use Section 53.2 for that purpose. To that end, each Party expressly reserves its rights with respect to any position taken in any prior Guide dispute, and nothing in this Agreement shall be deemed or construed to limit or prejudice any position a Party has taken or may take before the Commission, the FCC, or a court of applicable jurisdiction regarding any prior Guide dispute.
11. (cont'd)	(Cont'd) Both Parties' Issue Statement: Should the CenturyTel Service Guide be incorporated for: establishing bill dispute processes?	9.4.1	<p>The Arbitrators agree with Charter's argument that the billing dispute process should be included in the Parties' Agreement and not contained in the Guide. However, the Arbitrators find that the written information required (i.e. service(s) for which the disputed charge was assessed, amount of the disputed charge(s), bill date, account number, etc) when submitting a billing dispute should be consistent for all CLECs. Therefore the Arbitrators find the billing dispute process shall be included in the Parties' Agreement and any references to the Guide in this section of the Agreement, shall only be for purposes of instructing CLECs as to what written information should be provided when submitting a billing dispute. To further clarify what information should be provided by a CLEC to CenturyTel when submitting a billing dispute, the Arbitrators recommend that CenturyTel develop a form to include in the Guide, that that CLECs submit for billing disputes.</p> <p>The Arbitrators adopt CenturyTel's contract language with the following modifications:</p> <p>9.4.1 Disputed Amounts Withheld From Payment.</p> <p>If any portion of an amount billed by a Party under this Agreement is subject to a good faith dispute between the Parties, the billed Party may withhold payment of such Disputed Amounts only if it gives written notice to the billing Party of the amounts it disputes and includes in such notice the specific details and reasons for disputing each item. Such written notice shall <u>be provided using the appropriate form located in the Service Guide located on the CenturyTel's Website submitted in accordance with the guidelines for submitting billing dispute claims set forth in CenturyTel's CLEC Service Guide.</u> Disputed billing claims shall be submitted no later than the Bill Due Date. Failure by the billed Party to file any such claim on or prior to the Bill Due Date means that the total</p>

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			<p>charges billed are due and payable to the billing Party on the due date. The billed Party shall pay all undisputed amounts no later than the Bill Due Date. The billed Party may not withhold payment of amounts past the due date pending a later filing of a dispute, but must pay all amounts due for which it has not provided a written notice of dispute on or prior to the Bill Due Date. If the billed Party disputes charges after the Bill Due Date and has not paid such charges, such charges shall be subject to late payment charges. If the billed Party disputes any charges and any portion of the dispute is resolved in favor of the billed Party, the Parties shall cooperate to ensure that the billing Party shall credit the invoice of the billed Party for that portion of the Disputed Amount resolved in favor of the billed Party, together with any late payment charges assessed with respect thereto no later than the second Bill Due Date after the resolution of the billing dispute. Nothing in this Section 9.4.1 shall constitute a waiver, or negation, of a Party's right to seek recovery of amounts already paid pursuant to Section 9.4.2 below.</p>
<p>11. (cont'd)</p> <p>Both Parties' Issue Statement: Should the CenturyTel Service Guide be incorporated for providing escalation lists?</p>	<p>(Cont'd)</p>	<p>16.</p>	<p>The Arbitrators find that it is in the best interest of the CLECs for CenturyTel to have an updated escalation list available. Moreover, the Arbitrators find that the most efficient way for CenturyTel to keep its escalation list updated and available to all CLECs would be to include the list in its Service Guide. Based upon the same rationale above for DPL No. 11, § 41, the Arbitrators find that reference to the Service Guide that provides an escalation list should be included in the Parties' ICA.</p> <p>Therefore, the Arbitrators adopt CenturyTel's proposed contract language:</p> <p>16. CONTACTS BETWEEN THE PARTIES</p> <p>Each Party shall update its own contact information and escalation list and shall provide such information to the other Party for purposes of inquiries regarding the implementation of this Agreement. Each Party shall accept all inquiries from the other Party and provide a timely response. CenturyTel will provide and maintain its contact and escalation list in its CenturyTel Service Guide ("Guide") as amended and updated from time to time. The Guide is provided to **CLEC on CenturyTel's Website, and any updates also will be provided on the Website in the event such information changes. Information contained in the Guide will include a single contact telephone number for CenturyTel's CLEC Service Center (via an 800#) that **CLEC may call for all ordering and status inquiries and other day-to-day inquiries between 8 a.m. and 5 p.m., Monday through Friday (except holidays). In addition, the Guide will provide **CLEC with contact information for the personnel and/or organizations within CenturyTel capable of assisting **CLEC with inquiries regarding the ordering, provisioning and billing of interconnection services. Included in this information will be the contact information for a person or persons to whom **CLEC can escalate issues dealing with the implementation of the Agreement</p>

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			and/or for assistance in resolving disputes arising under the Agreement.
11. (cont'd)	(Cont'd) Both Parties' Issue Statement: Should the CenturyTel Service Guide be incorporated for: reporting and resolving circuit troubles or repairs?	Art. VIII, 2.4	<p>Based upon the same rationale above for DPL No. 11, § 41, the Arbitrators find that reference to the Service Guide that provides the process for reporting and resolving circuit troubles or repairs should be included in the Parties' ICA.</p> <p>The Arbitrators adopt CenturyTel's proposed contract language:</p> <p>Article VIII (Maintenance), § 2.4:</p> <p>2.4 **CLEC agrees to follow the process and procedures for reporting and resolving circuit trouble or repairs as set forth in the CenturyTel Service Guide, or as otherwise agreed to by the Parties. Before contacting CenturyTel's Trouble Maintenance Center (CTMC), **CLEC must first conduct trouble isolation to ensure that the trouble does not originate from **CLEC's own equipment or network or the equipment of **CLEC's customer.</p>
11. (cont'd)	(Cont'd) Both Parties' Issue Statement: Should the CenturyTel Service Guide be incorporated for: submitting LNP requests?	Art. IX § 1.2.2	<p>Based upon the same rationale above for DPL No. 11, § 41, the Arbitrators find that reference to the Service Guide that provides the process for submitting LNP requests should be included in the Parties' ICA.</p> <p>The Arbitrators adopt CenturyTel's proposed contract language:</p> <p>Article IX (Additional Services), § 1.2.2:</p> <p>1.2.2 A Party requesting a number to be ported must send the other providing Party a Local Service Request (LSR). If **CLEC requests that CenturyTel port a number, the Parties shall follow the "Local Number Portability Ordering Process" set forth in CenturyTel Service Guide, which will comply with applicable FCC rules, regulations and orders.</p>
11. (cont'd)	(Cont'd) Both Parties' Issue Statement: Should the CenturyTel Service Guide be incorporated for: "service ordering, provisioning, billing and maintenance processes and procedures"?	Art. X § 6.3	<p>Based upon the same rationale above for DPL No. 11, § 41, the Arbitrators find that reference to the Service Guide that provides the process for service ordering, provisioning, billing and maintenance processes and procedures should be included in the Parties' ICA.</p> <p>The Arbitrators adopt CenturyTel's proposed contract language:</p>

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			<p>Article X (OSS), § 6.3:</p> <p>6.3 Except as specifically provided otherwise in this Agreement, service ordering, provisioning, billing and maintenance processes and procedures shall be governed by the CenturyTel Service Guide. The service order charges set forth pursuant to this Agreement, if any, shall apply to all orders placed via OSS or pre-OSS services, except as specifically provided otherwise in this Agreement.</p>
12.	<p>Charter Issue Statement:</p> <p>Should the Agreement allow one Party to force the other Party into commercial arbitration under certain circumstances?</p> <p>CenturyTel Issue Statement:</p> <p>If neither the FCC nor the Commission accepts jurisdiction over a dispute between the Parties arising out of the Agreement, should the Agreement permit a Party to submit such dispute to binding commercial arbitration before a mutually agreed upon arbitrator?</p>	20.3	<p>The Arbitrators agree with Charter's arguments that disputes arising out of this Agreement should be resolved and litigated before the Commission, the FCC, or a court of competent jurisdiction. Furthermore, only when both Parties mutually agree should the dispute be submitted to binding commercial arbitration. The Parties' ICA should not contain language that permits one party to force binding arbitration on another.</p> <p>The Arbitrators adopt Charter's proposed contract language:</p> <p>20.2 Informal Resolution of Disputes. At the written request of a Party, each Party will appoint a knowledgeable, responsible representative, empowered to resolve such dispute, to meet and negotiate in good faith to resolve any dispute arising out of or relating to this Agreement. The location, format, frequency, duration and conclusion of these discussions shall be left to the discretion of the representatives. Upon mutual agreement, the representatives may utilize other alternative dispute resolution procedures such as mediation to assist in the negotiations. Discussions and correspondence among the representatives for purposes of these negotiations shall be treated as Confidential Information developed for purposes of settlement, exempt from discovery, and shall not be admissible in any action between the Parties without the concurrence of all Parties. Documents identified in or provided with such communications, which are not prepared for purposes of the negotiations, are not so exempted and may, if otherwise discoverable, be discovered or otherwise admissible, and be admitted in evidence, in the arbitration or lawsuit.</p> <p>20.3 Formal Dispute Resolution. If the negotiations referenced in Section 20.2 above fail to produce an agreeable resolution within thirty (30) days, then either Party may proceed with any remedy available to it pursuant to law, equity or agency mechanisms, including, but not limited to, instituting an appropriate proceeding before the Commission, the FCC or a court of competent jurisdiction. In addition, upon mutual agreement of the Parties such disputes may also be submitted to binding commercial arbitration before a mutually agreed upon arbitrator.</p>
13.	<p>Charter Issue Statement:</p> <p>Should the Parties agree to a reasonable limitation as to the</p>	Art III §9.4, and §20.4,	<p>The Federal Communications Act provides generally that actions by and against carriers must be instituted within two years from the time the cause of action accrues. 47</p>

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	<p>period of time by which claims arising under the Agreement can be brought?</p> <p>CenturyTel Issue Statement: There are two issues presented in this Issue 13:</p> <p>(a) If the Parties are unable to resolve a "billing dispute" through established billing dispute procedures, should the billed Party be required to file a petition for formal dispute resolution within one (1) year of providing written notice of such dispute, or otherwise waive the dispute?</p> <p>(b) To the extent a "Claim" arises under the Agreement, should a Party be precluded from bringing such "Claim" against the other Party more than twenty-four (24) months from the date of the occurrence giving rise to the "Claim"?</p>	<p>and Art II § 2.26.1</p>	<p>U.S.C. § 415 (2008). Consistent with this provision, the ICAs approved in Docket No. 28821 contained a general two-year statute of limitations for claims. <i>See e.g. Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement</i>, Docket No. 28821 INTERCONNECTION AGREEMENT-TEXAS between Southwestern Bell Telephone, L.P. d/b/a SBC TEXAS and CLEC, Section 11.1.1, p. 22 (August 25, 2005) The Arbitrators find that CenturyTel has presented no compelling basis to deviate from this general standard.</p> <p>The Arbitrators adopt Charter's proposed contract language:</p> <p>Art III § 9.4 Disputed Amounts. The following shall apply where a Party disputes, in good faith, any portion of an amount billed under this Agreement ("Disputed Amounts"). Both **CLEC and CenturyTel agree to expedite the investigation of any Disputed Amounts, promptly provide all documentation regarding the amount disputed that is reasonably requested by the other Party, and work in good faith in an effort to resolve and settle the dispute through informal means prior to initiating formal dispute resolution."</p> <p>Art III §20.4 Except as otherwise specifically provided in this Agreement, no Claims will be brought for disputes arising from this Agreement more than twenty-four (24) months from the date of the occurrence which gives rise to the dispute. Notwithstanding the foregoing, Claims for indemnification will be governed by the applicable statutory limitation period."</p> <p>ART. II, § 2.26.1 CLAIMS The term Claims means any pending or threatened claim, action, proceeding or suit."</p>
14.	<p>Charter Issue Statement: Should CenturyTel be allowed to assess charges upon Charter for as yet unidentified and undefined, potential "expenses" that CenturyTel may incur at some point in the future?</p> <p>CenturyTel Issue Statement: There are two issues presented in this Issue 14: (a) If Charter requests that CenturyTel provide a service</p>	<p>22, and Art. I, § 3</p>	<p>The Arbitrators do not agree with Charter's argument that CenturyTel is attempting to assess charges upon Charter for unidentified "expenses" but rather finds that CenturyTel is seeking to recover "reasonable and necessary costs" or costs that are to be determined (TBD) for a service or facility that is offered under the Parties' Agreement, but for which no pricing has been established. In Docket No. 28821, the Commission determined for services or facilities for which the Parties have not negotiated and/or the State Commission has not reviewed or approved a specific rate should be shown in the Appendix Pricing section of the Parties' Agreement as Individual Case Basis (ICB). <i>See Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement</i>, Docket No. 28821, Arbitration Award at 34 (June 20, 2005). Moreover,</p>

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	<p>or perform an act not otherwise provided for under the Agreement, and Charter pre-approves the quoted costs of CenturyTel's performance, should the Agreement include a provision requiring Charter to pay such costs as pre-approved by Charter?</p> <p>(b) If a service or facility is offered under the Agreement but does not have a corresponding charge set forth in the Pricing Article, should such service or facility be subject to "TBD" pricing pursuant to Article III, Section 46?</p>		<p>the ICB pricing should reflect an engineering estimate of the actual costs of time and materials required to perform such modifications.</p> <p>The Arbitrators find that CenturyTel's proposed language conforms to the previous decision made by the Commission and should be adopted:</p> <p>22. EXPENSES</p> <p>22.1 In performing under this Agreement, if **CLEC makes a request not already provided for in this Agreement, CenturyTel may be required to make expenditures or otherwise incur costs that are not otherwise reimbursed under this Agreement. In such event, CenturyTel is entitled to reimbursement from **CLEC for all such reasonable and necessary costs to the extent pre-approved by **CLEC. For all such costs and expenses, CenturyTel shall receive through nonrecurring charges ("NRCs") the actual costs and expenses incurred, including labor costs and expenses, overhead and fixed charges, and may include a reasonable contribution to CenturyTel's common costs. If **CLEC makes a request that involves expenditures or costs not otherwise covered under this Agreement, CenturyTel will provide a quote to **CLEC in a timely manner and **CLEC must agree in writing to accept the quoted charges prior to CenturyTel's initiation of work.</p> <p>Article I, § 3:</p> <p>Notwithstanding any other provision of this Agreement, neither Party will assess a charge, fee, rate or any other assessment (collectively, for purposes of this provision, "charge") upon the other Party except where such charge is specifically authorized and identified in this Agreement, and is (i) specifically identified and set forth in the Pricing Article, or (ii) specifically identified in the Pricing Article as a "TBD" charge. Where this Agreement references a Tariff rate or provides that a specific service or facility shall be provided pursuant to a Tariff, the Tariff rates associated with such specifically referenced service or facility shall be deemed a charge that has been specifically authorized under this provision. If a service or facility otherwise offered under the Agreement does not have a corresponding charge specifically set forth in the Pricing Article, or is not specifically identified in the Pricing Article as being subject to "TBD" pricing, such service and/or facility is not available to **CLEC under this Agreement.</p>
15.	Indemnity, Warranties, and Limitation of liability Issues (Sub-Issues 15(a), 15(b), and 15(c))		
15(a)	Charter Issue Statement: Should Charter be required to indemnify CenturyTel even where CenturyTel's actions are deemed to be negligent,	Art. III §30.1	The Arbitrators view the provision of indemnity for a party's own misconduct to be an extraordinary assignment of risk and a disincentive for proper conduct. Accordingly ICAs approved by the Commission in prior Docket Nos. 28821, 35402 and 32453 exclude

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<p>grossly negligent, or constituting intentional or willful misconduct; or if CenturyTel otherwise contributes to the harm that is the subject of the cause of action?</p> <p>CenturyTel Issue Statement: Issue 15(a) consists of two sub- parts):</p> <p>Part (1):</p> <p>Should indemnification obligations be triggered by agreed-upon threshold issues or instead become the basis for protracted disputes between the Parties?</p> <p>Part (2):</p> <p>Should the items of damage and cost for which the Indemnifying Party is responsible be identified where the claimant is that Party's customer?</p>	<p>indemnification for one's own improper conduct. <i>Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement</i>, Docket No. 28821 INTERCONNECTION AGREEMENT-TEXAS between Southwestern Bell Telephone, L.P. d/b/a SBC TEXAS and CLEC, Sections 7.3.1 & 7.3.1.1, p.16-17 (ICA between SBC TEXAS and CLEC Coalition) (August 25, 2005); <i>Petition of Comcast Phone of Texas, LLC for Arbitration of an Interconnection Agreement with United Telephone Company of Texas, Inc. D/B/A/ Embarq and Central Telephone Company of Texas, Inc D/B/A Embarq Pursuant to Section 252 of the Federal Communications Act of 1934, as Amended and Applicable State Laws</i>, Docket No. 35402, INTERCONNECTION AND COLLOCATION AGREEMENT FOR THE STATE OF TEXAS Comcast Phone of Texas, LLC, and United Telephone Company of Texas, Inc. d/b/a Embarq Central Telephone Company of Texas, Inc. d/b/a Embarq, Section 11.1, p.26 (October 21, 2008); <i>Petition of United Telephone Company of Texas, Inc. D/B/A Sprint for Arbitration with Cedar Valley Communications, Inc. pursuant to Section 252(B)(1) of the Federal Telecommunications Act of 1996</i>, Docket No. 32453, INTERCONNECTION, COLLOCATION AND RESALE AGREEMENT FOR THE STATE OF TEXAS Cedar Valley Communications, Inc. and United Telephone Company of Texas, d/b/a Embarq, Section 11.1, p. 27 (July 17, 2006).</p> <p>The Arbitrators adopt Charter's proposed contract language:</p> <p>Art. III §30.1 Indemnification Against Third-Party Claims.</p> <p>Each Party (the "Indemnifying Party") agrees to indemnify, defend, and hold harmless the other Party (the "Indemnified Party") and the other Party's Subsidiaries, predecessors, successors, Affiliates, and assigns, and all current and former officers, directors, members, shareholders, agents, contractors and employees of all such persons and entities (collectively, with Indemnified Party, the "Indemnitee Group"), from any and all Claims, except to the extent that such Claims arise from the Indemnified Party's negligence, gross negligence, or intentional or willful misconduct. For purposes of this Section 30, "Claim" means any action, cause of action, suit, proceeding, claim, or demand of any third party (and all resulting judgments, bona fide settlements, penalties, damages, losses, liabilities, costs, and expenses (including, but not limited to, reasonable costs and attorneys' fees)), (a) based on allegations that, if true, would establish (i) the Indemnifying Party's breach of this Agreement; (ii) the Indemnifying Party's misrepresentation, fraud or other misconduct; (iii) the Indemnifying Party's negligence; (iv) infringement by the Indemnifying Party or by any Indemnifying Party product or service of any patent, copyright, trademark, service mark, trade name, right of publicity or privacy, trade secret, or any other proprietary right of any third party; (v) the Indemnifying Party's liability in relation to any material that is defamatory or wrongfully discloses private or personal</p>
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		<p>matters; or (vi) the Indemnifying Party's wrongful use or unauthorized disclosure of data; or (b) that arises out of (i) any act or omission of the Indemnifying Party or its subcontractors or agents relating to the Indemnifying Party's performance or obligations under this Agreement; (ii) any act or omission of the Indemnifying Party's customer(s) or End User(s); (iii) the bodily injury or death of any person, or the loss or disappearance of or damage to the tangible property of any person, relating to the Indemnifying Party's performance or obligations under this Agreement; (iv) the Indemnifying Party's design, testing, manufacturing, marketing, promotion, advertisement, distribution, lease or sale of services and/or products to its customers, or such customers' use, possession, or operation of those services and/or products; or (v) personal injury to or any unemployment compensation claim by one or more of the Indemnifying Party's employees, notwithstanding any protections the Indemnifying Party might otherwise have under applicable workers' compensation or unemployment insurance law, which protections the Indemnifying Party waives, as to the Indemnified Party and other persons and entities to be indemnified under this Section 30.1 (other than applicable employee claimant(s)), for purposes of this Section 30.1. "Reasonable costs and attorneys' fees," as used in this Section 30.1, includes without limitation fees and costs incurred to interpret or enforce this Section 30.1. The Indemnified Party will provide the Indemnifying Party with reasonably prompt written notice of any Claim. At the Indemnifying Party's expense, the Indemnified Party will provide reasonable cooperation to the Indemnifying Party in connection with the defense or settlement of any Claim. The Indemnified Party may, at its expense, employ separate counsel to monitor and participate in the defense of any Claim.</p> <p>Notwithstanding anything to the contrary in this Section 30.1, a Party may not seek indemnification with respect to any Claim by that Party's customer(s) or End User(s), but rather shall be the Indemnifying Party with respect to all Claims by its customer(s) and End User(s).</p> <p>The Indemnifying Party agrees to release, indemnify, defend, and hold harmless the Indemnatee Group and any third-party provider or operator of facilities involved in the provision of products, services or facilities under this Agreement from all Claims suffered, made, instituted, or asserted by the Indemnifying Party's End User Customer(s) arising from or relating to any products, services or facilities provided by or through the Indemnified Party or such third-party provider or operator, except to the extent that any such Claims were caused by the Indemnified Party's or other third-party provider's or operator's negligence, gross negligence, or intentional or willful misconduct. The Indemnifying Party further agrees to release, indemnify, defend, and hold harmless the Indemnatee Group from all Claims, suffered, made, instituted, or asserted by any third party against an Indemnified Party arising from or in any way related to actual or alleged defamation, libel, slander, interference with or misappropriation of proprietary or creative right, or any other injury to any person or property arising out of content transmitted by</p>
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			the Indemnifying Party's End User Customer(s).
15(b)	<p>Charter Issue Statement: Should the Parties disclaim implied warranties related to the provision of "information and services" that may arise under the Uniform Computer Information Transactions Act (UCITA)?</p> <p>CenturyTel Issue Statement: Should the disclaimer of warranties be limited to product-based language or extend to the information and services that are the subject of the Parties' Agreement?</p>	Art. III §30.2	<p>Parties agree to disclaim all warranties, whether express or implied (except those expressly provided in the agreement or required by law). They also specifically enumerate certain warranties by name that are disclaimed but indicate that their disclaimer of all warranties is not limited by that list. The Parties' controversy over which warranties should be included in the enumeration is not determinative of which warranties are excluded under the ICA. The Arbitrators therefore determine that the inclusion of the warranties proposed by CenturyTel accurately reflect the agreement of the Parties.</p> <p>The Arbitrators adopt CenturyTel's proposed contract language for Issue 15(b):</p> <p>Art III §30.2 "Disclaimer of Warranties.</p> <p>EXCEPT FOR THOSE WARRANTIES EXPRESSLY PROVIDED IN THIS AGREEMENT OR REQUIRED BY STATUTE, EACH PARTY ON BEHALF OF ITSELF AND ITS AFFILIATES AND SUPPLIERS DISCLAIMS ALL WARRANTIES AND DUTIES, WHETHER EXPRESS OR IMPLIED, AS TO THE SERVICES, PRODUCTS AND ANY OTHER INFORMATION OR MATERIALS EXCHANGED BY THE PARTIES, INCLUDING BUT NOT LIMITED TO ANY IMPLIED WARRANTIES, DUTIES, OR CONDITIONS OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, REASONABLE CARE, WORKMANLIKE EFFORT, RESULTS, LACK OF NEGLIGENCE, OR ACCURACY OR COMPLETENESS OF RESPONSES. EXCEPT FOR THOSE WARRANTIES EXPRESSLY PROVIDED IN THIS AGREEMENT OR REQUIRED BY STATUTE, THERE IS NO WARRANTY OF TITLE, QUIET ENJOYMENT, QUIET POSSESSION, CORRESPONDENCE TO DESCRIPTION, AUTHORITY, OR NON-INFRINGEMENT WITH RESPECT TO THE SERVICES, PRODUCTS, AND ANY OTHER INFORMATION OR MATERIALS EXCHANGED BY THE PARTIES UNDER THIS AGREEMENT.</p>
15(c)	<p>Charter Issue Statement: Should the Agreement limit direct damages to an amount equal to "monthly charges" assessed between the Parties; and otherwise limit liability in an equitable manner?</p>	Art. III §§30.3, and 30.4	<p>In Docket No. 28821, the Commission approved ICAs that restrict damages to the amounts charged (or those that would be charged) for the pertinent products or services and prohibit consequential damages except for cases of willful or gross conduct. See e.g. <i>Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement</i>, Docket No. 28821 INTERCONNECTION AGREEMENT-TEXAS between Southwestern Bell Telephone, L.P. d/b/a SBC TEXAS and CLEC,</p>

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	<p>CenturyTel Issue Statement: Should the Agreement limit damages in a manner that is consistent with telecommunications industry practice and Charter's own customer agreements and tariffs?</p>	<p>Sections 7.1.2 & 7.2 p.15-16 (ICA between SBC TEXAS and CLEC Coalition) (August 25, 2005) Accordingly, the Arbitrators adopt the language proposed by CenturyTel restricting direct damages to the monthly charges for the services or facilities for which the claim arose; but also adopts the language proposed by Charter excluding cases of gross negligence as well as intentional or willful misconduct from the limitations.</p> <p>The Arbitrators adopt CenturyTel's proposed contract language modified as follows to incorporate certain Charter proposed language:</p> <p>30.3 <u>Limitation of Liability; Disclaimer of Consequential Damages; Exceptions.</u></p> <p>30.3.1 Except as provided in Section 30.3.3, each Party's liability to the other, whether in contract, tort or otherwise, shall be limited to direct damages, which shall not exceed the monthly charges, plus any related costs/expenses the other Party may recover, including those under Section 22.1 above, and plus any costs/expenses for which the Parties specify reimbursement in this Agreement for the services or facilities for which the claim of liability arose. Except as provided in Section 30.3.3, each Party's liability to the other during any Contract Year resulting from any and all causes will not exceed the total of any amounts charged to **CLEC by CenturyTel under this Agreement during the Contract Year in which such cause accrues or arises. For purposes of this Section 30.3.1, the first Contract Year commences on the first day this Agreement becomes effective, and each subsequent Contract Year commences on the day following the anniversary of that date.</p> <p>30.3.2 EXCEPT AS PROVIDED IN SECTION 30.3.3, NEITHER PARTY WILL BE LIABLE TO THE OTHER PARTY FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, RELIANCE, OR SPECIAL DAMAGES SUFFERED BY SUCH OTHER PARTY (INCLUDING WITHOUT LIMITATION DAMAGES FOR HARM TO BUSINESS, LOST REVENUES, LOST SAVINGS, OR LOST PROFITS SUFFERED BY SUCH OTHER PARTY), REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, WARRANTY, STRICT LIABILITY, OR TORT, INCLUDING WITHOUT LIMITATION, NEGLIGENCE OF ANY KIND WHETHER ACTIVE OR PASSIVE, AND REGARDLESS OF WHETHER THE PARTIES KNEW OF THE POSSIBILITY THAT SUCH DAMAGES COULD RESULT.</p> <p>Should either Party provide advice, make recommendations, or supply other analysis related to the services or facilities described in this Agreement, this limitation of liability shall apply to the provision of such advice, recommendations, and analysis.</p>
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			<p>30.3.3 Section 30.3.1 and Section 30.3.2 do not apply to the following:</p> <p>30.3.3.1 Indemnification under Section 30.1;</p> <p>30.3.3.2 Breach of any obligation of confidentiality referenced in this Agreement;</p> <p>30.3.3.3 Violation of security procedures;</p> <p>30.3.3.4 Any breach by **CLEC of any provision relating to **CLEC's access to or use of Operations Support Systems;</p> <p>30.3.3.5 Failure to properly safeguard, or any misuse of, customer data;</p> <p>30.3.3.6 Statutory damages;</p> <p>30.3.3.7 Liability for <u>gross negligence, and</u> intentional or willful misconduct;</p> <p>30.3.3.8 Liability arising under any applicable Tariff;</p> <p>30.3.3.9 Liability arising under any indemnification provision contained in this Agreement or any separate agreement or the applicable provisions of the CenturyTel of Lake Dallas Inc. General Exchange Tariff on file with the Public Utility Commission of Texas related to provisioning of 911/E911 services;</p> <p>30.3.3.10 Each Party's obligations under Section 27, Intellectual Property, of this Article III;</p> <p>30.3.3.11 Section 30.4.2 and/or Section 30.4.3 of this Article III;</p> <p>30.3.3.12 Section 45, Taxes, of this Article III, and/or</p> <p>30.3.3.13 Liability arising under any indemnification provision contained in <u>this Agreement</u>, a separate agreement or the applicable provisions of the CenturyTel of Lake Dallas Inc. Wholesale Services Tariff on file with the Public Utility Commission of Texas related to provisioning of Directory Listing or Directory Assistance Services.</p> <p>30.4 Liability of Each Party.</p>
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			<p>In addition to the general limitation of liability in this Section 30, the following shall also limit each Party's liability under this Agreement.</p> <p>30.4.1 Inapplicability of Tariff Liability. CenturyTel's general liability, as described in its local exchange or other Tariffs, does not extend to **CLEC, **CLEC's End User Customer(s), suppliers, agents, employees, or any other third parties. Liability of CenturyTel to **CLEC resulting from any and all causes arising out of services, facilities or any other items relating to this Agreement shall be governed by the liability provisions contained in this Agreement and no other liability whatsoever shall attach to CenturyTel. Without limiting the generality of any other provision herein, CenturyTel shall not be liable for any loss, claims, liability or damages asserted by **CLEC, **CLEC's End User Customer(s), suppliers, agents, employees, or any other third parties arising out of or relating to CLEC's combination or commingling of its components with those components provided by CenturyTel to CLEC. **CLEC's general liability, as described in its local exchange or other Tariffs, does not extend to CenturyTel, CenturyTel's End User Customer(s), suppliers, agents, employees, or any other third parties. Liability of **CLEC to CenturyTel resulting from any and all causes arising out of services, facilities or any other items relating to this Agreement shall be governed by the liability provisions contained in this Agreement and no other liability whatsoever shall attach to **CLEC.</p> <p>30.4.2 **CLEC Tariffs or Contracts. Nothing in this Agreement shall be deemed to create a third-party beneficiary relationship between CenturyTel and any of **CLEC's End User Customers, suppliers, agents, employees, or any other third parties, except to the extent any such party is included within the applicable Indemnatee Group, for the purpose of indemnification as provided herein only. Nothing in this Agreement shall be deemed to create a third-party beneficiary relationship between **CLEC and any of CenturyTel's End User Customers, suppliers, agents, employees, or any other third parties, except to the extent any such party is included within the applicable Indemnatee Group, for the purpose of indemnification as provided herein only.</p> <p>30.4.3 No Liability for Errors. If **CLEC uses the signaling networks and call-related databases identified herein, then CenturyTel is not liable for mistakes in CenturyTel's signaling networks (including but not limited to signaling links and Signaling Transfer Points (STPs) and call-related databases (including but not limited to the Line Information Database (LIDB), Toll Free Calling database, Local Number Portability database, Advanced Intelligent Network databases, Calling Name database (CNAM), 911/E911 databases, and OS/DA databases). **CLEC shall indemnify, defend and hold harmless CenturyTel and CenturyTel's Indemnatee Group from any and all claims, demands, causes of action and liabilities whatsoever, including costs, expenses and reasonable attorneys' fees incurred on account thereof, by or to **CLEC's End User Customer(s), suppliers,</p>
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